No. 81-2354

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In The
Supreme Court of the United States

October Term, 1982

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO; NICHOLAS MANCUSO, as President of the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO; STEPHEN ROSENDALE; BRIAN HUGHES; NICHOLAS PORTARO; RICHARD COMISKEY; FRANCIS McCAFFERY; ROBERT HIGDON; THOMAS SIRIGANO; THOMAS THOMPSON; EDWARD WAZETER and ROBERT ALT,

Petitioners,

vs.

THE CITY OF NEW YORK, a municipal corporation; EDWARD KOCH, as Mayor of the City of New York; THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK; JUAN ORTIZ, as Chairman of the Civil Service Commission of the City of New York; HARRY AMER, ANNE BUEHLER, NATALIE KATZ and MARK LEBOW, as Commissioners of the Civil Service Commission of the City of New York; THE DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK; MICHAEL NADEL, as Director of the Department of Personnel of the City of New York; THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and AUGUSTUS BEEKMAN, as Fire Commissioner of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether an action under Title 42, Section 1983 of the United States Code may be maintained to redress a violation of Title 29, Sections 801 *et seq.* of the United States Code (The Comprehensive Employment and Training Act of 1973, as amended and renumbered by the Comprehensive Employment and Training Act Amendments of 1978).

LIST OF ALL PARTIES

All parties appear in the caption of the case in this Court.

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No.

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UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO; NICHOLAS MANCUSO, as President of the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO; STEPHEN ROSENDALE; BRIAN HUGHES; NICHOLAS PORTARO; RICHARD COMISKEY; FRANCIS McCAFFERY; ROBERT HIGDON; THOMAS SIRIGANO; THOMAS THOMPSON; EDWARD WAZETER and ROBERT ALT,

Petitioners,

vs.

THE CITY OF NEW YORK, a municipal corporation; EDWARD KOCH, as Mayor of the City of New York; THE CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK; JUAN ORTIZ, as Chairman of the Civil Service Commission of the City of New York; HARRY AMER, ANNE BUEHLER, NATALIE KATZ and MARK LEBOW, as Commissioners of the Civil Service Commission of the City of New York; THE DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK; MICHAEL NADEL, as Director of the Department of Personnel of the City of New York; THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and AUGUSTUS BEEKMAN, as Fire Commissioner of the City of New York,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion and Order of the Court of Appeals for the Second Circuit[1] is officially reported at 676 F.2d 20 (2d Cir. 1982). A reproduction of this Opinion and Order appears in the Appendix hereto at 1a-9a. The Opinion and Order of the United States District Court for the Southern District of New York (Pollack, J.) is officially reported at 512 F. Supp. 289 (S.D.N.Y. 1980). A reproduction of this Opinion and Order appears in the Appendix hereto at 10a-20a.

JURISDICTION

This petition for a writ of certioriari has been filed within 90 days of the entry of judgment of the Court of Appeals for the Second Circuit on March 25, 1982 as required by 28 U.S.C.A. §2101(c) (West 1981). This Court's jurisdiction to review the judgment below is invoked under 28 U.S.C.A. §1254(1) (West 1966).

STATUTORY PROVISIONS INVOLVED

42 U.S.C.A. §1983 (West 1981) provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

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1. Lumbard and Newman, Circuit Judges; Zampano, District Judge for the District of Connecticut.

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

29 U.S.C.A. §848(a)(4) (West 1975) [Section 208(a)(4) of the Comprehensive Employment and Training Act of 1973, which has been replaced by similar provisions found in Section 122(k) of the Comprehensive Employment and Training Act Amendments of 1978 codified as 29 U.S.C.A. §824(k) (West Supp. 1981)] provides:

> (a) The Secretary shall not provide financial assistance for any program or activity under this subchapter unless he determines, in accordance with such regulations as he shall prescribe, that —
>
> (4) all persons employed in public service jobs under this subchapter will be assured of workmen's compensation, health insurance, unemployment insurance, and other benefits at the same levels and to the same extent as other employees of the employer and to working conditions and promotional opportunities neither more nor less favorable than such other employees enjoy;

29 U.S.C.A. §816(1) (West Supp. 1981) provides:

> The existence of remedies under this section shall not preclude any person, who alleges that an action of a prime sponsor or of any other recipient violates any of the provisions of the chapter or the regulations promulgated under the chapter, from instituting a civil action or pursuing any other remedies authorized under Federal, State, or local law.

29 U.S.C.A. §816 (West Supp. 1981) is set forth in the Appendix hereto at 21a-28a.

STATEMENT OF THE CASE

A. The Proceedings

This action was commenced on April 14, 1980 in the District Court for the Southern District of New York. The jurisdiction of that court was premised on 28 U.S.C.A. §1331 (West Supp. 1981), 28 U.S.C.A. §1337 (West 1976) and 28 U.S.C.A. §1343(a) and (b) (West Supp. 1980). On November 24, 1980, prior to answering the complaint, defendants filed a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the complaint for failure to state a claim upon which relief can be granted. Subsequently, on April 17, 1981, the District Court (Pollack, J.) issued its Opinion and Order dismissing the complaint in its entirety for failure to state a claim upon which relief can be granted.

On March 25, 1982, the Court of Appeals for the Second Circuit affirmed the decision below.

B. The Facts

On or about June 30, 1975, approximately 1,650 uniformed firefighters employed by the City of New York, including the petitioners herein, were suspended for economic reasons by the City from their positions with the Fire Department.

In November 1975, the City applied for and was granted federal funds pursuant to the Comprehensive Employment and Training Act of 1973, as amended, 29 U.S.C.A. §§801 *et seq.* (West Supp. 1981) [hereinafter "CETA"] in order to rehire City employees, including firefighters, laid off during the fiscal crisis.

Additional funds were also obtained from the job opportunity programs of the United States Department of Housing and Urban Development ("HUD") to reemploy City employees. Subsequently, in December 1975, the City rehired approximately 400 of these firefighters using funds obtained through these federal grants. These firefighters performed the same duties as the ordinary firefighters paid entirely out of City funds.

In order to be reemployed under the federal programs, an applicant had to meet stringent eligibility requirements including residence within the City of New York and a specified period of unemployment. *See, e.g.*, 29 C.F.R. §§99.36 and 99.53 (1975). However, Section 81 of the New York Civil Service Law requires that whenever positions in the civil service are abolished by reason of economic conditions, a preferred eligible list must be promulgated and this list must be used in rank order to fill any vacancies without regard to the place of residency of the suspended civil servant. As a result, in order to alleviate the prejudicial effects resulting from compliance with these incongruous requirements, the City provisionally appointed these rehired firefighters. This "provisional" appointment was instituted so as not to prejudice the seniority rights of the non-resident firefighters who remained on the City's preferred eligible list. Accordingly, this "provisional" appointment resulted in the non-accrual of seniority credits. As a result of the denial of seniority credit for the period petitioners were employed as "provisional firefighters (CETA)", petitioners were denied promotional opportunities open to non-CETA firefighters employed on the job for the same length of time as the petitioners.

Petitioners contended below that the denial of seniority credit for the period of their service in the title "provisional firefighter (CETA)" resulted in a violation of their Fourteenth Amendment right to equal protection of law and a violation of their substantive right under 29 U.S.C.A. §848(a)(4) (West 1975) [amended and

renumbered 29 U.S.C.A. §824(k) (West Supp. 1981)] to treatment commensurate to that accorded non-CETA firefighters with regard to terms and conditions of employment. Petitioners sought to establish this statutory right by an implied private right of action as well as a right of action based on 42 U.S.C.A. §1983 (West 1981). Petitioners also alleged two pendent state law causes of action.

Both the District Court and the Court of Appeals found that petitioners' Fourteenth Amendment rights had not been violated, that a right of action was not implied under CETA and that a cause of action could not be stated under 42 U.S.C.A. §1983 to remedy a violation of CETA. The Court of Appeals, having so concluded, dismissed the pendent state law causes of action for want of jurisdiction.

Petitioners herein seek certiorari only on the issue of the availability of a cause of action under 42 U.S.C.A. §1983 to remedy a violation of the provisions of CETA.

REASONS FOR GRANTING THE WRIT

The question of the availability of a cause of action under 42 U.S.C.A. §1983 to enforce the provisions of CETA is a topical issue of pervasive and substantial proportions.

Three terms ago this Court held in *Maine v. Thiboutot*, 448 U.S. 1 (1980) that 42 U.S.C.A. §1983 encompasses claims based on purely statutory violations of federal law. This Court stated that:

> Section 1983 provides:
>
> "Every person who, under color of any statute, ordinance, regulation, custom,

> or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution *and laws* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (Emphasis added.)
>
> The question before us is whether the phrase "and laws", as used in §1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifier to the phrase, the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act. *Thiboutot*, 448 U.S. at 4.[2]

The breadth of the *Thiboutot* decision was recognized by Justice Powell, who, in dissent, stated that the Court holds that ". . . 42 U.S.C.A. §1983 creates a cause of action for deprivations under color of state law of any federal statutory right." *Thiboutot*, 448 U.S. at 11. Further, Justice Powell listed CETA in an appendix

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2. Petitioners need not rely upon the *Thiboutot* interpretation that the phrase "and laws" in 42 U.S.C.A. §1983 encompasses all statutory claims, not just those alleging a deprivation of civil rights or equal protection of law. The substantive right of petitioners alleged to have been violated herein is based on 29 U.S.C.A. §848(a)(4) (West 1975) [amended and renumbered 29 U.S.C.A. §824(k) (West Supp. 1981)] which provides for equal treatment of CETA and non-CETA employees in many areas, including promotional opportunities.

to his dissent among the federal statutes which may be affected by the *Thiboutot* decision. *Thiboutot*, 448 U.S. at 36.

Recently the Court reaffirmed the holding in *Thiboutot* in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Justice Powell, now writing for the Court, acknowledged the holding of *Thiboutot*, but stated that an exception to that holding had been recognized in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981) where the congressional intent underlying the statute allegedly violated sought to preclude a private remedy under 42 U.S.C.A. §1983. *Sea Clammers*, 453 U.S. at 19.[3] In *Sea Clammers*, the Court discerned such an intent on the part of Congress based predominantly on the comprehensiveness of the enforcement schemes embodied in the statutes involved; the Federal Water Pollution Control Act, as amended [33 U.S.C.A. §§1251 *et seq.* (West 1978)] (hereinafter "FWPCA") and the Marine Protection, Research and Sanctuaries Act of 1972 [33 U.S.C.A. §§1401 *et seq.* (West 1978)] (hereinafter "MPRSA"). The inquiry under *Thiboutot* and *Sea Clammers* is, therefore, whether the intent underlying 42 U.S.C.A. §1983, recognized in *Thiboutot*, to provide a private remedy for violation of any federal statute, is overridden by the congressional intent underlying the particular statute

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3. The Court in *Pennhurst* also held that the statutory provision alleged to have been violated must create a substantive right in order to be actionable under 42 U.S.C.A. §1983. In that case, the alleged right sought to be vindicated arose under a provision which was construed to be exhortatory rather than mandatory upon states receiving assistance under the act in question, the Developmentally Disabled Assistance and Bill of Rights Act of 1975 [42 U.S.C.A. §§6000 *et seq.* (West 1977)]. *Pennhurst*, 451 U.S. at 28, n. 21. In this case, the substantive right alleged to have been violated arises from 29 U.S.C.A. §848(a)(4) (West 1975) [amended and renumbered 29 U.S.C.A. §824(k) (West Supp. 1981)] which makes mandatory upon recipients the equal treatment of CETA employees and non-CETA employees in public service jobs.

involved to withdraw or preclude a right of action under 42 U.S.C.A. §1983. As recognized by the majority and the dissent in *Sea Clammers,* the burden of establishing the intent to withdraw the right of action under 42 U.S.C.A. §1983 lies with the defendants. *Sea Clammers,* 453 U.S. at 20-21, n. 31.

It is submitted that this petition should be granted and the issues presented herein decided in order to eradicate the confusion evident in the Second Circuit opinion in applying the rules of *Thiboutot* and *Sea Clammers.* After finding that Congress did not intend to imply a right of action under CETA in view of the comprehensive enforcement scheme contained therein, citing its decision in *CETA Workers' Organizing Committee v. City of New York,* 617 F.2d 926 (2d Cir. 1980), the Second Circuit proceeded to find that a 42 U.S.C.A. §1983 cause of action was likewise unavailable. This latter finding of the Court was also compelled by the existence of the CETA enforcement scheme. In support of this conclusion, the Second Circuit cited this Court in *Sea Clammers* to the effect that, "When the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under §1983. 453 U.S. at 20, 101 S. Ct. at 2626." *Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO et al., v. City of New York, et al.,* 676 F.2d 20, 22 (2d Cir. 1982) (6a-7a). Further, the Second Circuit held that the "saving clause" in CETA [29 U.S.C.A. §816(1)] did not authorize a statutory violation claim under 42 U.S.C.A. §1983. 29 U.S.C.A. §816(1) provides:

> The existence of remedies under this section shall not preclude any person, who alleges that an action of a prime sponsor or any other recipient violates any of the provisions of the chapter or the regulations promulgated under the chapter, from instituting a civil action or pursing any other

> remedies authorized under Federal, State, or local law.

The Second Circuit stated that, "Whatever else this section may mean, we do not construe it to authorize a statutory violation claim under §1983, since the Supreme Court was not persuaded by a similar argument involving a comparable provision in *Middlesex County Sewerage Authority v. National Sea Clammers Association, supra,* 453 U.S. at 20-21 n. 31, 101 S. Ct. at 2626 n. 31." *Uniformed Firefighters,* 676 F.2d at 23 (8a).

It is submitted that the Second Circuit's utilization of an implied right analysis in this case led to a misinterpretation of the rule in *Sea Clammers.* The proper method of analysis under *Sea Clammers* begins with the proposition that a 42 U.S.C.A. §1983 cause of action may be maintained to remedy the violation of a federal statute unless the evident congressional intent precludes such remedy. Thus, the Court in *Sea Clammers* held that the existence of sufficiently comprehensive remedial devices *may* suffice to demonstrate congressional intent to withdraw a 42 U.S.C.A. §1983 action to remedy violations of the subject statute. That conclusion is not mandated, however, and the analysis is not complete particularly where, as here, a "saving clause" preserves all other remedies authorized under Federal, State, or local law for the violation of the provisions of this particular chapter. The Second Circuit's misapplication of the rule of *Sea Clammers* is further evident in its conclusion that this "saving clause" does not authorize a statutory violation claim under §1983. The inquiry under *Sea Clammers* is not whether this "saving clause" authorizes a §1983 action, but whether it expresses congressional intent to withdraw a §1983 action which is presumed, *a priori,* to exist.

It is submitted that if the Second Circuit had utilized the proper analysis under *Sea Clammers,* it would have perceived the

manifest difference between the CETA "saving clause" and the "saving clauses" involved in *Sea Clammers*. The "saving clauses" under FWPCA [33 U.S.C.A. §1365(e) (West 1978)] and MPRSA [33 U.S.C.A. §1415(g)(5) (West 1978)] were first construed in *Sea Clammers* under an implied right analysis not to indicate congressional intent to *imply* a right of action to remedy violations of the particular statutes involved. With regard to the "saving clause" in FWPCA [33 U.S.C.A. §1365(e)] the Court stated that:

> . . . the language of the savings clause . . . is quite ambiguous concerning the intent of Congress to "preserve" remedies under the FWPCA itself. It merely states that nothing in the citizen-suit provisions "shall restrict any right which any person . . . may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." It is doubtful that the phrase "any statute" includes the very statute in which this statement was contained. *Sea Clammers*, 453 U.S. at 15-16.

The Court reached a similar conclusion with regard to the "saving clause" contained in MPRSA [33 U.S.C.A. §1415(g)(5)]. *Sea Clammers*, 453 U.S. at 17. The Court further held that the language of these "saving clauses" likewise did not support the position that Congress expressly preserved §1983 remedies for violations of these statutes. Rather, the Court held that "The legislative history makes clear Congress' intent to allow further enforcement of antipollution standards arising under other statutes or state common law." *Sea Clammers*, 453 U.S. at 20-21, n. 31.

The CETA "saving clause" [29 U.S.C.A. §816(1)] is unambiguous in its language. It expressly states that:

> The existence of remedies under this section shall not preclude any person, who alleges that an action of a prime sponsor or any other recipient violates *any of the provisions of the chapter* or the regulations promulgated under the chapter, from instituting a civil action or pursuing any other remedies authorized under Federal, State, or local law. (Emphasis added.)

Thus, contrary to the Second Circuit's conclusion, the CETA "saving clause" is not similar to the "saving clauses" at issue in *Sea Clammers. Uniformed Firefighters,* 676 F.2d at 23 (8a). The ambiguity in 33 U.S.C.A. §1365(e) and 33 U.S.C.A. §1415(g)(5) permits the conclusion in *Sea Clammers,* based upon the interpretation of the entire statutory schemes, that Congress intended to withdraw a separate right of action under 42 U.S.C.A. §1983 to remedy violations of the provisions of FWPCA and MPRSA. Here, however, the CETA "saving clause" precludes by its express language recourse to other indicia of congressional intent, in this case found only in the existence of a statutory enforcement mechanism, to infer an intention to foreclose a §1983 action to redress violations of CETA.[4] The reasoning of Justice Steward, who in dissent to the Court's opinion in *Sea Clammers*

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4. The legislative history behind the CETA "saving clause" reinforces petitioners' position that this clause does not withdraw a §1983 action to redress violations of the Act. The "section by section" analysis contained in the Senate Report of its version of the "saving clause" [there numbered Section 106(e)] stated that ". . .nothing in this act precludes a person who alleges a violation of the act or regulations from instituting a civil action." S. Rep. No. 891, 95th Cong., 2d. Sess. 81, reprinted in [1978] U.S. Code Cong. & Admin. News, pp. 4480, 4561. This legislative history, which is entirely consistent with the final wording of the "saving clause", compels the conclusion that the congressional intent was to save, rather than withdraw, a §1983 action to remedy violations of this Act.

concluded that the saving clauses contained in FWPCA and MPRSA clearly did not indicate congressional intent to preclude §1983 actions, applies, *a fortiori,* here. He stated that "Respondents' right to proceed under §1983 in light of these statutory provisions could have been more plain only had Congress substituted the citation '42 U.S.C. §1983 [42 U.S.C.S. §1983]' for the words 'any statute' in the savings clauses." *Sea Clammers,* 453 U.S. at 29 (Stevens, J., dissenting).

It is submitted that this Court should grant this petition to provide guidance to lower courts in the application of the rules of *Thiboutot* and *Sea Clammers.* The Second Circuit in this case, perhaps due to the extent to which implied right analysis is ingrained in our jurisprudence, failed to distinguish and apply the proper analytical approach mandated by *Thiboutot* and *Sea Clammers.* Such approach presumes the existence of a §1983 action to remedy the violation of any federal statute. This was the intent found to underlie 42 U.S.C.A. §1983 in *Thiboutot.* On the other hand, implied right analysis presumes before analysis that no right of action exists. This difference in presumptions frames different questions which the courts must answer in their analysis of the congressional intent. In implied right analysis, the court must determine whether Congress intended to create a private right of action. Under *Thiboutot* and *Sea Clammers,* the court must determine whether Congress intended to withdraw a §1983 action. Although under both analytical approaches consideration of the same indicia of congressional intent may mandate the conclusion that neither a private right was implied nor a §1983 action permitted, as in *Sea Clammers,* it is, nonetheless, certainly possible to conclude that although a private right was not implied, a §1983 action was not withdrawn.[5]

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5. In *Smith v. City of Chicago,* No. 79 C. 3499 (N.D. Ill., March 20, 1981), Judge Marshall, after concluding that Congress did not intend to imply a right

(Cont'd)

In this case, to hold as the Second Circuit did, that the CETA "saving clause" [29 U.S.C.A. §816(1)] does not operate to preserve a §1983 action in view of the provision of an enforcement mechanism within CETA requires either one of two conclusions. First, that Congress is powerless to leave open other avenues of relief to redress violations of a statute in which it provides a comprehensive enforcement scheme or, second, that *Thiboutot* is dead letter law. However, as stated by Justice Steward in *Sea Clammers*, "No matter how comprehensive we may consider a statute's remedial scheme to be, Congress is at liberty to leave other remedial avenues open." *Sea Clammers*, 453 U.S. at 28, (Stevens, J., dissenting). Further, *Thiboutot* was not overruled by *Sea Clammers*. *Sea Clammers* merely recognized that Congress may intend in a particular statute to withdraw the §1983 remedy which is presumed, *a priori*, to be available with regard to all federal statutes. To conclude in this case that Congress intended

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(Cont'd)
of action under CETA, held, following the rule of *Thiboutot*, that a §1983 action could be maintained to redress a violation of the provisions of CETA. In fact, at page 14 of Judge Marshall's unpublished Memorandum Decision he stated that:

> The remedies available to plaintiff under §1983 are complimentary rather than inconsistent with those available under CETA. Plaintiffs can continue to challenge the Department of Labor's funding of Chicago's CETA program by pursuing their administrative remedies. The City's funding remains protected by all the procedural safeguards contained in CETA. At the same time, however, plaintiffs can seek personal damages and injunctive relief against the city defendants for failure to treat plaintiffs in the manner required by CETA. This double-barreled attack appears to be precisely what is contemplated by §816(1) which allows a plaintiff to proceed under CETA and to pursue any other remedy authorized by law.

to withdraw a §1983 action under CETA notwithstanding the express language of the "saving clause" [29 U.S.C.A. §816(1)] simply does not attribute to the words of that "saving clause" their fair meaning or intendment. The goal in statutory interpretation must be to give the statute its intended meaning. As courts must be chary of implying rights under statutes which expressly provide particular remedies [*see Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11 (1979)], they should be equally chary in rendering the express words of Congress vacuous.

To conclude, it is submitted that the petition should be granted so that this Court might demonstrate the proper application of the rules of *Thiboutot* and *Sea Clammers*. The value of such guidance from this Court transcends the importance of this case. The issue raised herein concerning the availability of relief under a 42 U.S.C.A. §1983 cause of action may be raised with reference to a myriad of diverse federal statutes.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted in this case.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED MARCH 25, 1982

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 225, Docket 81-7387

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO, et al.,

Plaintiffs-Appellants,

vs.

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

Argued Nov. 20, 1981

Decided March 25, 1982

Union and individual fire fighters brought action against various New York City defendants, alleging that denial of seniority credits to provisional fire fighters rehired after layoff using Comprehensive Employment and Training Act funds violated their rights under equal protection clause, CETA and its accompanying regulations, federal civil rights statute, and various New York laws. The United States District Court for the Southern District of New York, Milton Pollack, J., 512 F. Supp. 289, granted city's motion to dismiss for failure to state a claim, and plaintiffs appealed. The Court of Appeals, Newman, Circuit Judge, held

that: (1) there is no implied private right of action under CETA; (2) CETA's comprehensive remedial scheme provided exclusive remedy, notwithstanding "saving clause," and thus allegation of violation of CETA failed to state claim under federal civil rights statute; (3) denial of seniority credits to provisional fire fighters and their allowance to regular city fire fighters did not constitute violation of equal protection clause; and (4) pendent state law claims were thus properly dismissed.

Affirmed.

1. United States Key 82(1)

There is no implied private right of action under Comprehensive Employment and Training Act. Comprehensive Employment and Training Act of 1973, §2 et seq. as amended 29 U.S.C.A. §801 et seq.

2. Civil Rights Key 13.12(3)

Comprehensive Employment and Training Act's comprehensive remedial scheme provides exclusive remedy, notwithstanding "saving clause" that existence of its remedies shall not preclude person from instituting civil action under federal, state, or local law, and thus union's and fire fighters' allegation of violation of CETA in denial of seniority credits to them during "provisional" appointments failed to state a claim under federal civil rights statute. Comprehensive Employment and Training Act of 1973, §§2 et seq., 106, 106(a)(1), 107 as amended 29 U.S.C.A. §§801 et seq., 816, 816(a)(1), 817; 42 U.S.C.A. §1983.

3. Constitutional Law Key 238.5

Denial of seniority credits to provisional fire fighters rehired after layoff using Comprehensive Employment and Training Act

funds and their allowance to regular city fire fighters did not constitute violation of equal protection clause where, under state law, rehired fire fighters were provisional employees and, as such, were not entitled to protections, including seniority credits, that state law extended only to regular civil service employees. N.Y. McKinney's Civil Service Law §81; Comprehensive Employment and Training Act of 1973, §2 et seq. as amended 29 U.S.C.A. §801 et seq.; 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

4. Constitutional Law Key 238.5

Equal protection clause is not violated by governmental decision to limit seniority credits to employees appointed pursuant to civil service regulations, which restriction manifestly advances governmental interest in preventing abuses of civil service system. N.Y. McKinney's Civil Service Law §81; U.S.C.A. Const. Amend. 14.

John F. Mills, Garden City, N.Y. (Colleran, O'Hara, Kennedy & Mills, P.C., Garden City, N.Y., James V. Morgan, Cohen, Weiss & Simon, New York City, on the brief), for plaintiffs-appellants.

Fay Leoussis, New York City (Allen G. Schwartz, Corp. Counsel for the City of New York, Carolyn E. Demarest, New York City, on the brief), for defendants-appellees.

Before LUMBARD and NEWMAN, Circuit Judges, and ZAMPANO,* District Judge.

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* The Honorable Robert C. Zampano of the United States District Court for the District of Connecticut, sitting by designation.

Opinion

NEWMAN, Circuit Judge:

The City of New York, as a result of a severe financial crisis, was forced in June 1975 to lay off approximately 1650 firefighters. Later, in December 1975, the City rehired approximately 400 of these firefighters, using funds obtained pursuant to the Comprehensive Employment and Training Act of 1973 ("CETA"), 29 U.S.C. §801 *et seq.* (1976) (prior to 1978 amendment), and from the United States Department of Housing and Urban Development ("HUD"). These rehired firefighters, who were compensated in part with CETA, HUD, or temporary City funds, were notified at the time of rehiring that, because their appointments were on a provisional basis,[1] they would not receive seniority credits for promotional purposes for time served as "provisional CETA," "provisional HUD," or "temporary" firefighters.

Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, its president, and ten individual firefighters who are Union members instituted a suit against various New York City defendants ("the City"),[2] alleging that the denial of seniority

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1. The City had promulgated a "preferred" eligibility list of the laid-off firefighters pursuant to New York law. *See* N.Y.Civ.Serv.Law §81 (McKinney 1973). Section 81 requires the City to fill vacancies from this preferred eligibility list. Under CETA regulations, however, participants in the CETA program must "reside within the geographic area for which funds have been designated," 29 C.F.R. §99.38(a) (1981)—*i.e.*, in New York City. Since many of the laid-off firefighters resided outside of New York City and therefore could not be rehired with CETA funds, the City decided to rehire resident firefighters on a provisional basis, without the accrual of seniority credits, to avoid prejudicing the rights of the non-resident firefighters on the preferred eligibility list.

2. Defendants are the City of New York; its Mayor; the Civil Service Commission of the City of New York, its Chairman, and four Civil Service (Cont'd)

credits violated their rights under the Equal Protection Clause of the Fourteenth Amendment, CETA and its accompanying regulations, 42 U.S.C. §1983, and various New York laws. The District Court for the Southern District of New York (Milton Pollack, Judge) granted the City's motion to dismiss for failure to state a claim on which relief may be granted. Judgment was entered April 20, 1981. For the reasons stated below, we affirm.

[1] The District Court was correct in holding that there is no implied private right of action under CETA. *See CETA Workers' Organizing Committee v. City of New York,* 617 F. 2d 926, 934 (2d Cir. 1980). Appellants attempt to distinguish *CETA Workers',* arguing that the nature of the action and the relief sought in that case differ from the instant case. But we did not limit the *CETA Workers'* decision to the precise set of facts there presented. In determining that at least two parts of the four-part test of *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), were not met, we emphasized the comprehensiveness of CETA's administrative procedures for processing grievances and noted that the statute authorizes the Secretary of Labor to rectify violations of CETA, subject to judicial review. *See* 617 F.2d at 933. "Congress, relying on the Secretary's expertise and ability to balance the various elements of the program in the interest of the various recipients, present and future participants, and so on, has established an elaborate system of administrative review, which would appear intended to be exclusive." *Id.* at 933-34. We therefore reject appellants' claim that the District Court erred

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(Cont'd)
Commissioners; the Department of Personnel of the City of New York and its Director; and the Fire Department of the City of New York and its Fire Commissioner.

in dismissing their claim based on an implied private right of action under CETA.

[2] Appellants are no more successful in attempting to allege a violation of CETA as a claim under 42 U.S.C. §1983.[3] Although the Supreme Court indicated in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), that §1983 provides a remedy for state action in violation of any federal statute, the Court has subsequently qualified the breadth of the §1983 remedy for statutory violations. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 19-22, 101 S.Ct. 2615, 2625-27, 69 L.Ed.2d 435 (1981); *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). In *Pennhurst*, the Court stated that *Thiboutot* does not permit use of §1983 to redress a violation of a statute if "the 'governing statute provides an exclusive remedy for violations of its terms.' " *Id.* at 28, 101 S.Ct. at 1545 (quoting *Maine v. Thiboutot, supra*, 448 U.S. at 22 n.11, 100 S.Ct. at 2513 n.11 (Powell, J., dissenting)). In *Sea Clammers*, the Court further observed, "When the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice

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3. Appellants contend that the denial of seniority credits to the provisional firefighters violates 29 U.S.C. §848(a)(4) (1976) (current version at 29 U.S.C. §824(k) (Supp.II 1978)), which provided that

> all persons employed in public service jobs under this subchapter will be assured of workmen's compensation, health insurance, unemployment insurance, and other benefits at the same levels and to the same extent as other employees of the employer and to working conditions and promotional opportunities neither more nor less favorable than such other employees enjoy.

to demonstrate congressional intent to preclude the remedy of suits under §1983." 453 U.S. at 20, 101 S.Ct. at 2626. We think that CETA's comprehensive remedial scheme[4] provides an exclusive remedy. As we noted in *CETA Workers'*, "The totality of [CETA's remedial] provisions, comprehensive and well-crafted to the Act's administrative, institutional, and political exigencies, affirms the primacy and suggests the exclusivity of the grievance procedures, at least in cases seeking redress against a prime sponsor or other recipient of funds." 617 F.2d at 930-31.

The existence of a "saving clause" within CETA does not alter our conclusion. Section 106(1), 29 U.S.C. §816(1) (Supp.II 1978), provides:

> The existence of remedies under this section shall not preclude any person, who alleges that an action of a prime sponsor or of any other recipient violates any of the provisions of the chapter or the regulations promulgated under the chapter, from instituting a civil action or pursuing any other remedies authorized under Federal, State, or local law.

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4. Section 106 and 107 of CETA, as amended in 1978, 29 U.S.C. §§816-817 (Supp.II 1978), provide a number of remedies: a grievance procedure, including a hearing, *id.* §816(a)(1); investigation of the complaint by the Secretary of Labor within twenty days of receipt of the complaint, *id.* §816(b); revocation of a prime sponsor's comprehensive employment and training program and termination of financial assistance to the prime sponsor for its discrimination or other violations, *id.* §816(c); and termination or suspension of a prime sponsor's financial assistance for noncompliance with CETA's provisions, *id.* §816(d)(1)-(2), (e). In addition, the Act provides for judicial review of the Secretary's decision, *id.* §817.

Whatever else this section may mean, we do not construe it to authorize a statutory violation claim under §1983, since the Supreme Court was not persuaded by a similar argument involving a comparable provision in *Middlesex County Sewerage Authority v. National Sea Clammers Association, supra,* 453 U.S. at 20-21 n.31, 101 S.Ct. at 2626-27 n.31.[5]

[3, 4] Appellants also cannot succeed in their §1983 constitutional claim, which alleged that the denial of seniority credits to provisional firefighters and their allowance to regular City firefighters constitutes a violation of the Equal Protection Clause. The appellants were provisional employees under state law, *Carritue v. Beame,* 90 Misc.2d 504, 395 N.Y.S.2d 573 (Sup. Ct. 1976), *aff'd,* 61 A.D.2d 957, 402 N.Y.S.2d 1012 (1st Dept. 1978), and as such were not entitled to protections, including seniority credits, that state law extends only to regular civil service employees. *Koso v. Greene,* 260 N.Y. 491, 184 N.E. 65 (1933). The Equal Protection Clause is not violated by a governmental decision to limit seniority credits to employees appointed pursuant to civil service regulations, a restriction that manifestly advances the governmental interest in preventing abuses of the civil service system, *see Sheridan v. Kern,* 255 A.D. 57, 5 N.Y.S.2d 336 (1st Dep't 1938).

Finally, the District Court was correct in dismissing appellants' pendent state law claims. "[I]f the federal claims are dismissed

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5. Since we find §1983 unavailable to support appellants' statutory claim because CETA provides an exclusive administrative remedy, we need not consider whether CETA creates "rights, privileges, or immunities" within the meaning of §1983. *Cf. Sea Clammers, supra,* 101 S.Ct. at 2626 (declining to determine if water pollution legislation creates rights enforceable under §1983 because of comprehensive remedial devices in the legislation).

before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966).

Accordingly, the judgment of the District Court is affirmed, 512 F.Supp. 289.

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT DATED APRIL 17, 1980 (POLLACK, J.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 80 Civ. 2036(MP).

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, AFL-CIO; Nicholas Mancuso, as President of the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO; Stephen Rosendale; Brian Hughes; Nicholas Portaro; Richard Comiskey; Francis McCaffery; Robert Higdon; Thomas Sirigano; Thomas Thompson; Edward Wazeter and Robert Alt,

Plaintiffs,

vs.

THE CITY OF NEW YORK, a municipal corporation, Edward Koch, as Mayor of the City of New York; The Civil Service Commission of the City of New York; Juan Ortiz, as Chairman of the Civil Service Commission of the City of New York; Harry Amer, Anne Buehler, Natalie Katz and Mark Lebow, as Commissioners of the Civil Service Commission of the City of New York; The Department of Personnel of the City of New York; Michael Nadel, as Director of the Department of Personnel of the City of New York; The Fire Department of the City of New York and Augustus Beekman, as Fire Commissioner of the City of New York,

Defendants.

Decision

April 17, 1981

New York City firemen, who were suspended for economic reasons and who were reemployed and compensated in part with CETA, HUD or temporary funds and placed on "provisional" status, brought action against city and others to recover seniority credit for promotional purposes for time they served as provisional city employees. The District Court, Milton Pollack, J., held that: (1) New York City firemen failed to state cause of action under CETA statute; (2) New York City firemen could not maintain action under statute for deprivation of right or privilege; and (3) defendants' refusal to grant provisional firemen seniority credit did not create impermissible distinction which violated equal protection clause of Fourteenth Amendment.

Ordered accordingly.

1. United States Key 82(1)

No private right of action, express or implied, exists to redress alleged violations of the Comprehensive Employment and Training Act or its regulations. Comprehensive Employment and Training Act, §2 et seq. as amended 29 U.S.C.A. §801 et seq.

2. United States Key 82(1)

New York City firemen, who were suspended for economic reasons and who were reemployed and compensated in part with CETA, HUD or temporary funds and placed on "provisional" status, did not have a private right of action, express or implied, to redress violations of CETA allegedly resulting from denial of seniority credit for period of their service as provisional firemen.

Comprehensive Employment and Training Act, §2 et seq. as amended 29 U.S.C.A. §801 et seq.

3. Civil Rights Key 12.3

Statute prohibiting deprivation of right or privilege is not available to remedy violations of statutes which provide exclusive remedy for violation of its terms. 42 U.S.C.A. §1983.

4. Civil Rights Key 12.3

New York City firemen, who were suspended for economic reasons and who were reemployed and compensated in part with CETA, HUD or temporary funds and placed on "provisional" status, could not bring, under statute prohibiting deprivation of a right or privilege, claim that denial of seniority credit for period of their service as provisional firefighters was violative of CETA statute and regulations promulgated thereunder in view of fact that CETA statute clearly provided exclusive remedy for violation of its terms. Comprehensive Employment and Training Act, §2 et seq. as amended 29 U.S.C.A. §801 et seq.; 42 U.S.C.A. §1983.

5. Constitutional Law Key 238.5

City's refusal to grant firemen, who were suspended for economic reasons and who were reemployed and compensated in part with CETA, HUD or temporary funds and placed on "provisional" status, seniority credit did not create impermissible distinction which violated equal protection clause of Fourteenth amendment in view of fact there was legitimate purpose for defendants' conduct, namely, compliance with New York law making distinction in legal status between permanent civil service employees and temporary or provisional employees. U.S.C.A. Const. Amend. 14.

Decision

Cohen, Weiss & Simon, by James V. Morgan, New York City, for plaintiffs.

Allen G. Schwartz, Corp. Counsel of the City of New York, by Stephen P. Kramer and Maralyn Fairberg, Asst. Corp. Counsels, New York City, for defendants.

OPINION

MILTON POLLACK, District Judge.

Defendants move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing the complaint for failure to state a claim on which relief may be granted. The suit is by the Uniformed Firefighters Association ("UFA") on its own behalf and for and in the interests of all firemen employed by the City of New York by the President of UFA in behalf of the association and of the firemen employed by the City who are members of the UFA.

The complaint asserts that on or about June 30, 1975 approximately 1,650 uniformed firemen employed by the City, including the 10 individual plaintiffs herein were suspended for economic reasons by the City from their positions with the Fire Department. As a result of a severe budgetary crisis the City was compelled to order widespread layoffs of thousands of permanent civil service employees.

In November 1975, the City applied for and was granted federal funds pursuant to the Comprehensive Employment and Training Act of 1973, as amended, 29 U.S.C. §801 *et seq.* ("CETA") in order to rehire city employees, including firefighters,

laid off during the fiscal crisis. Subsequently, additional funds were also obtained from the job opportunity programs of the United States Department of Housing and Urban Development ("HUD") to re-employ city employees.

In order to be re-employed under the federal programs an applicant had to meet stringent eligibility requirements including residence within the City of New York and a specified period of unemployment. *See e.g.*, 29 C.F.R. 99.36; 99.53 (1975). Section 81 of the New York Civil Service Law requires that whenever positions in the civil service are abolished by reason of economic conditions, a preferred eligible list must be promulgated and this list must be used in rank order to fill any vacancies that arise. Viewing the federal and state statutes together, the City in making appointments to federally-funded positions, could not use the eligible list promulgated under sections 81 of the Civil Service Law of New York since many individuals on that list were not residents of the City.

Beginning on or about December 15, 1975 and continuing through August 13, 1977 the City re-employed suspended firemen, compensating them in part with CETA, HUD or temporary funds. The eligible list was used as a reference to find the names of laid-off firefighters who met the federal eligibility requirements, including residence in the City of New York. These individuals were appointed "provisionally" so as not to prejudice the rights of the non-resident firefighters who remained on the eligible list. Firemen designated "provisional" were not permitted by the City to accrue seniority credit for their services for purposes of eligibility for Fire Department promotional examinations (*e.g.*, "examinations for promotion to lieutenant or fire marshal titles"), or for computing eligibility for promotion. At the time each individual was appointed to the title "Firefighter" (CETA) and

Decision

"Firefighter" (HUD), he was informed that his appointment was made on a provisional basis and therefore he would not receive seniority credit for promotional purposes for service in that title.

"Provisional" CETA, HUD and temporary firemen, including the individual plaintiffs were not assigned to duties different from the duties of permanent firemen not compensated by CETA, HUD or temporary funds. They performed the same duties as permanent firemen who were not suspended for economic reasons. In fact, it is claimed that they perform the same duties as they had when they were permanent firemen themselves prior to their suspensions, and as they did when they later became permanent firemen again.

Beginning on or about July 31, 1976, "provisional" CETA, HUD and temporary firemen were notified by the City that their "provisional" status had terminated and that they would be considered permanent CETA or HUD firemen or in the case of temporary firemen, simply as permanent firemen. Firemen whose "provisional" designation was thus removed were permitted to once again accrue seniority for Fire Department service for eligibility for promotional examinations and for computing eligibility for promotions. Thus, although still compensated in part by CETA or HUD funds such firemen who passed from the provisional designation to permanent status continued to be compensated in part by CETA or HUD funds and were permitted to accrue seniority for promotional purposes in the same manner as permanent firemen compensated solely with City funds.

Thereafter, at various times up to August 13, 1977, firemen, including the individual plaintiffs, who had been re-employed by the City as "provisional" CETA, HUD or temporary firemen were notified that they were once again permanent firemen

compensated entirely by regular City tax levy funds as they had been prior to June 30, 1975 and that they were entitled to accrue seniority for promotional purposes.

This Court is asked to decide whether plaintiffs are entitled to receive seniority credit for promotional purposes for the time they served as provisional City employees in the titles "Firefighter (CETA)" "Firefighter (HUD)" and "temporary Firefighter." For the reasons set forth below, this Court has determined that plaintiffs have no such entitlement.

[1, 2] 1. Plaintiffs contend that the denial of seniority credit for the period of their service in the title "provisional Firefighter (CETA)" is violative of the CETA statute and the regulations promulgated thereunder. However, no private right of action, express or implied, exists to redress alleged violations of CETA or its regulations. *CETA Worker's Organizing Committee v. The City of New York*, 617 F.2d 926 (2d Cir. 1980). *See also, CETA Worker's Action Committee v. The City of New York*, 509 F.Supp. 902 (S.D.N.Y. 1981).

The grievance procedure explicitly set forth in the CETA statute provides the exclusive means which Congress intended for redress of any purported statutory wrong. There was no intention manifested by Congress from which to suggest that Congress intended to create a private cause of action in the District Courts to consider a claim of alleged violation of the CETA statute or its regulations.

[3, 4] Plaintiffs seek to base a claim upon 42 U.S.C. §1983 contending that this statute creates an independent cause of action for violation of the laws of the United States including CETA. This argument is mounted on *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) which plaintiffs claim

permits suits under §1983 based on violations of all federal statutes, i.e. every person who subjects any citizen or other person within the jurisdiction of the United States to the deprivation of any rights secured by the Constitution *and laws*, shall be liable to the injured party. However, §1983 certainly is not available to remedy violations of statutes which provide an exclusive remedy for violation of its terms. *See Maine v. Thiboutot, supra,* at 2513 n. 11 (Powell, J. dissenting); *LeBoeuf v. Ramsey,* 503 F.Supp. 747 (D. Mass. 1980) (violation of Title VII cannot be the basis for a cause of action under section 1983 because to do so would allow the claimant to bypass the detailed administrative process in Title VII); *Chesapeake Bay Foundation v. Virginia State Water,* 501 F.Supp. 821, 826 (E.D. Va. 1980) (Section 1983 does not establish a cause of action to remedy an alleged violation of the Federal Water Pollution Control Act since that Act "prescribes a complex and far-reaching set of procedures and remedies to be used where violations of its sections are alleged."); *Meyerson v. State of Arizona,* 507 F.Supp. 859 (D. Ariz. 1981) (claimed violation of the Revenue Sharing Act cannot be redressed pursuant to Section 1983 because Congress has provided a remedy within the statute itself.).[1]

The "Comprehensive Administrative Procedure for determination of complaints" found in the CETA statute clearly provides the exclusive remedy for violation of its terms. *CETA Worker's, supra,* 617 F.2d at 933-34.

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1. Our attention has been called to the recent decision in *Smith v. City of Chicago,* No. 79 C. 3499 (N.D. Ill. E.D. March 20, 1981). With respect, this Court does not agree with the Illinois Court for the reasons and authorities mentioned above.

Decision

[5] 2. Plaintiffs contend that since the work performed by the provisional firemen and the permanent firemen was identical, the defendant's refusal to grant the provisional firemen seniority credit creates an impermissible distinction which violates the Equal Protection Clause of the Fourteenth Amendment.

It is undisputed that defendants did deny plaintiffs' seniority credit for the time they served as provisional CETA and HUD firemen and granted such credit to those holding permanent, civil service positions. There was a legitimate purpose for defendants' conduct: compliance with State law. In *Carritue v. Beame*, 90 Misc.2d 504, 395 N.Y.S.2d 573 (Sup.Ct. N.Y. Co. Sp. Term Part 1, 1976), *aff'd*, 61 A.D.2d 957, 402 N.Y.S.2d 1012 (1st Dept. 1978), the state court found that even though the CETA firemen performed substantially similar functions as those performed by regular City firemen their legal status was different: they were "provisionals". Under the New York law, there is a difference in legal status between permanent Civil Service employees and temporary or provisional employees. Those holding positions as provisional employees are entitled to none of the rights, including seniority for promotional purposes, which the law attaches to the status of a permanent Civil Service appointee. *Koso v. Greene*, 260 N.Y. 491, 184 N.E. 65 (1933). The denial of seniority credit for service in temporary or provisional positions has long been recognized by the New York courts as a safeguard against abuses of the established Civil Service System. *Sheridan v. Kern*, 255 App.Div. 57, 5 N.Y.S.2d 336 (1st Dept. 1938).

The Court in *Carritue* found that the firemen who were not eligible for the CETA program were not prejudiced by the CETA appointments since the CETA firemen, by dint of their provisional status would not accrue seniority benefits for their CETA service. The provisionals would "remain in the same position on the eligible

list for permanent reappointment in relation to their brother firemen who were not eligible for the CETA program." *Carritue, supra,* at 575, 395 N.Y.S.2d 573.

Equality of status implied equality within category—within the class of employment. Unemployed firemen re-employed by temporary appointments or provisional employments are entitled to the emoluments of temporary appointees—they do not become temporaries with the attributes of permanent employees. Upon qualifying as permanent, they ascend to permanent status and to attributes of that class. To hold otherwise—for example—would be to say that employees given the rank of privates are entitled to emoluments of corporals or sergeants or whatever.

The law is not to be construed as directing that seniority rights in the vacated niche be kept open for a laid-off holder of the position so that seniority continues operative during the lay-off and that a temporary return to employment is to be treated as if there was no lay-off. The lay-off eliminated employment at the vacated level. It cannot be that a temporary return is to be treated as if there never was a vacated employment. Seniority accruals as well as salaries are terminated with lay-off and accrue again only with re-employment in the same status as a permanent employee.

The defendants clearly had a rational basis for the actions sought to be reviewed herein. Caught between the requirements of state law to make permanent appointments only in rank order from an eligible list, and a federal funding rule which limited hiring only to those persons residing in New York City, a complex appointment process was developed. Federal funds were used to hire provisionals without regard to the eligible list. As soon as a combination of City and Federal funds became available to hire

all persons on the eligible list in rank order, the eligible list was certified and permanent appointments were made in rank order without regard to a fireman's place of residence. Such appointments carried all the emoluments of permanent employment including seniority credit for promotional purposes. Since there was a legitimate purpose for defendants' policies, plaintiffs' federal and state constitutional and the statutory claims must be dismissed.

Defendants' motion to dismiss is granted and plaintiffs' complaint is dismissed in its entirety for failure to state a claim upon which relief can be granted.

SO ORDERED.

TITLE 29, SECTION 816 OF THE UNITED STATES CODE [SECTION 106 OF THE COMPREHENSIVE EMPLOYMENT AND TRAINING ACT AMENDMENTS OF 1978]

§816. Complaints and sanctions.

(a)(1) Except for complaints subject to the provision of paragraph (2), each prime sponsor receiving financial assistance under this chapter or contractor or grantee under subchapter III of this chapter shall establish and maintain a grievance procedure, including provision for hearings within 30 days after the filing of a grievance, and for handling complaints about the program arising from its participants, subgrantees, contractors, and other interested persons. Hearings under such procedure shall be conducted expeditiously and decisions shall be made not later than 60 days after the filing of the grievance involved. With the exception of grievances alleging fraud or any criminal activity, the filing of a grievance must be made within one year of the alleged occurrence.

(2) Whenever the recipient of financial assistance under this chapter is an employer and the participant is an employee of that employer, the recipient shall continue to operate or shall establish and maintain a grievance procedure relating to the terms and conditions of employment.

(b) Whenever the Secretary receives a complaint from any interested person or organization (which has exhausted the prime sponsor's grievance system under subsection (a)(1) of this section or which has exhausted or failed to achieve resolution of the grievance under the recipient's grievance system under subsection (a)(2) of this section or under a collective bargaining agreement within the time limits prescribed in subsection (a)(1) of this section or in such agreement) which alleges, or whenever the Secretary has reason to believe (because of an audit, report, on-site review,

or otherwise) that a recipient of financial assistance under this chapter is failing to comply with the requirements of this chapter, the regulations under this chapter, or the terms of the comprehensive employment and training plan, the Secretary shall investigate the matter. The Secretary shall conduct such investigation, and make the final determination required by the following sentence regarding the truth of the allegation or belief involved, not later than 120 days after receiving the complaint. If, after such investigation, the Secretary determines that there is substantial evidence to support such allegation or belief that such a recipient is failing to comply with such requirements, the Secretary shall, after due notice and opportunity for a hearing to such recipient, determine whether such allegation or belief is true.

(c)(1) The Secretary shall revoke all or any part of a prime sponsor's comprehensive employment and training plan and terminate financial assistance thereunder, if prior notice and opportunity for a hearing have been given, when the Secretary determines that the prime sponsor is maintaining a pattern or practice of discrimination in violation of section 834 of this title.

(2) The Secretary shall have the authority to revoke a prime sponsor's comprehensive employment and training plan and terminate financial assistance thereunder, if prior notice and opportunity for a hearing have been given, when the Secretary determines that the prime sponsor is—

(A) failing to make opportunities available equitably among the significant segments of the eligible population in the area it serves;

(B) failing to provide participants with employment or training opportunities at levels of skill and remuneration

that are commensurate with their capabilities or potential capabilities;

(C) failing to give due consideration to the eligible population in areas of chronic or concentrated unemployment;

(D) failing to give due consideration to funding of programs of demonstrated effectiveness;

(E) incurring unreasonable administrative costs in the conduct of activities and programs, as determined by the Secretary pursuant to regulations under this chapter;

(F) materially failing to expend funds in a reasonable period of time; or

(G) otherwise materially failing to carry out the purposes and provisions of this chapter or the regulations promulgated pursuant to this chapter.

(d)(1) If the Secretary concludes that any recipient of funds under this chapter is failing to comply with any provision of this chapter or the regulations under this chapter or that the recipient has not taken appropriate action against its subcontractors, subgrantees, and other recipients, the Secretary shall have authority to terminate or suspend financial assistance in whole or in part and order such sanctions or corrective actions as are appropriate, including the repayment of misspent funds from sources other than funds under this chapter and the withholding of future funding, if prior notice and an opportunity for a hearing have been given to the recipient. Whenever the Secretary orders termination or suspension of financial assistance to a subgrantee or subcontractor (including operators under a nonfinancial

agreement), the Secretary shall have authority to take whatever action is necessary to enforce such order, including action directly against the subgrantee or subcontractor, and an order to the primary recipient that it take such legal action, to reclaim misspent funds or to otherwise protect the integrity of the funds or ensure the proper operation of the program.

(2) If the Secretary concludes that a public service employment program is being conducted in violation of section 823(e)(2), (e)(3), (g)(1), section 824(c), (e), or section 825(g) of this title, or regulations promulgated pursuant to such sections, the Secretary shall, pursuant to paragraph (1) of this subsection, terminate or suspend financial assistance in whole or in part, order the repayment of misspent funds from sources other than funds under this chapter or other funds used in connection with programs funded under this chapter (unless, in view of special circumstances as demonstrated by the recipient, the Secretary determines that requiring repayment would not serve the purposes of attaining compliance with such sections), and order such other sanctions or corrective actions as are appropriate.

(e) In emergency situations, as determined by the Secretary, when it is necessary to protect the integrity of the funds or ensure the proper operation of the program, the Secretary may immediately terminate or suspend financial assistance in whole or in part, provided that prompt notice and opportunity for a subsequent hearing, within 30 days after such termination or suspension, are given to the recipient. The Secretary shall not delegate any of the functions or authority specified in this subsection other than to an officer whose appointment was required to be made by and with the advice and consent of the Senate.

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(f) If the Secretary determines that any recipient under this chapter has—

> (1) discharged or in any other manner discriminated against a participant or against any person in connection with the administration of the program involved or against any person because such person has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding or investigation under or related to this chapter, or otherwise unlawfully denied to any person a benefit to which that person is entitled under the provisions of this chapter or the Secretary's regulations, or
>
> (2) discriminated against any person, failed to serve equitably significant segments of the eligible population, or failed to provide employment or training opportunities at levels of skill and remuneration that are commensurate with the participant's capabilities or potential capabilities;

the Secretary shall, within 30 days, take such action or order such corrective measures, as necessary, with respect to the recipient or the aggrieved person, or both.

(g) The Secretary may withhold funds otherwise payable under this chapter in order to recover any amounts expended in any fiscal year in violation of any provision of this chapter, any regulation promulgated pursuant to this chapter, or any term or condition of assistance under this chapter. In the event of any

such withholding which results from fraud or abuse, the Secretary may order the prime sponsor to conduct the program as specified in the applicable plan on the basis of funds other than funds under this chapter and may enforce such order by appropriate civil action, unless the prime sponsor elects to terminate participation as a grantee under this chapter.

(h) With the consent and consideration of State agencies charged with the administration of State laws, the Secretary shall be authorized, for the purpose of carrying out this section and section 835 of this title, to utilize the services of State and local agencies and their employees. Notwithstanding any other provision of law, the Secretary is authorized to reimburse, in whole or in part, such State and local agencies and their employees for services rendered for such purposes.

(i)(1) Except as otherwise provided in subsection (e) of this section, the Secretary shall not revoke a prime sponsor's plan, in whole or in part, nor institute corrective action or sanctions against a prime sponsor under this section or any other provision of this chapter, without first providing the prime sponsor with notice by the Secretary of his intended actions and the reasons upon which those intended actions are based, and also providing the prime sponsor—

(A) with an opportunity to informally resolve those matters contained in the Secretary's notice; and

(B) in the event that the prime sponsor and the Secretary cannot informally resolve any matter

pursuant to clause (A), with a notice that (i) indicates that efforts to informally resolve matters contained in the Secretary's original notice have been unsuccessful; (ii) lists those matters upon which the parties continue to disagree; and (iii) informs the prime sponsor of any sanctions, corrective action, or any other alteration or modification of the prime sponsor's plan or program intended by the Secretary.

(2) Within 10 days of receipt of the Secretary's notice under paragraph (1)(B), the prime sponsor may request a hearing, but in no event shall the Secretary proceed under this subsection without first fulfilling all the requirements under this subsection.

(j) In order to ensure compliance with the provisions of this chapter and regulations promulgated under this chapter and to ensure conduct of programs in a manner consistent with the purposes and objectives of this chapter, the Secretary may require prime sponsors to participate in unified audit programs established by the Secretary to provide for the audit of both prime sponsors and their respective subgrantees and subcontractors. In any such case the Secretary may require the prime sponsor to pay, from funds under this chapter available to it for administrative expenses, that portion of the unified audit expenses allocable to the audit of such subgrantees and subcontractors.

(k) Nothing in this section shall be deemed to reduce the responsibility and full liability of the prime sponsors and other recipients which receive funds directly from the Secretary.

(l) The existence of remedies under this section shall not preclude any person, who alleges that an action of a prime sponsor or of any other recipient violates any of the provisions of the

chapter or the regulations promulgated under the chapter, from instituting a civil action or pursuing any other remedies authorized under Federal, State, or local law.